IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 118

UNION CARTAGE COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

BRIEF IN REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 448

UNION CARTAGE COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

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BRIEF IN REPLY TO MOTION TO AFFIRM

Pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, appellant files its brief opposing the motion to affirm.

REPLY

Appellant is, of course, as appellee points out, aware of the amount of agency discretion, particularly in the interpretation of its own certificates.[1] However,

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[1] *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, affirmed 344 U.S. 925 (1953).

we urge the court to scrutinize this particular case, rather than summarily dismiss it on the ground of agency discretion *per se*.

The notable reason that this proceeding should not be so dismissed is apparent from appellee's motion to affirm. Appellee states that:

> It [the lower court] therefore held that the designation 'commodities requiring the use of special equipment' does not confer additional transportation authority upon the appellant, but merely defines the nature of the transportation service, . . . of a heavy hauler . . . the phrase 'commodities requiring the use of special equipment' merely clarified the designation of a heavy hauler . . .

The above argument leads to no other logical conclusion than the phrase in controversy merely defines and clarifies, yet in reality means nothing, *i.e.*, it authorizes the transportation of no particular commodity. Certainly the discretion to interpret one of its own certificates belongs primarily to the Commission. However, destruction by interpretation is another matter. As alleged in the Jurisdictional Statement, the phrase, by construction, has been rendered meaningless as a substantive matter. In so doing, a basic principle, set forth by this court, has been violated.[2]

Subsequent to its argument that the phrase in question merely "clarifies," appellee proceeds to argue that the phrase "means" one thing in an exclusionary context and another when used affirmatively. Again, appellant must point out that the Commission itself in its discretion has held that a commodity description cannot logically mean one thing when used in granting

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[2] *United States* v. *Alpers*, 338 U.S. 680 (1950).

authority, and another when used as an exception to a grant.[3] Once more, the Commission is inconsistent to the detriment of appellant.

Combining appellee's several arguments, we find that the Commission allegedly has, by inclusion of the phrase in question, merely characterized the type of transportation to be performed by virtue of Certificate No. MC-95490. Therefore, we must necessarily conclude that the transportation of fertilizer, which is included within the instant certificate, is typical of heavy haulage. Such is not the case. The point is, that the inclusion of heterogenous commodities within a single certificate is not unusual. We refer, for example, to Certificate No. MC-101960, issued by the Interstate Commerce Commission authorizing the transportation of: *coal, livestock, lumber, agricultural commodities, farm implements, automobile accessories, feed,* and *groceries.*

A word must be said relative to appellee's reliance on *Petroleum Carrier Corp.* v. *Black.*[4] The majority of Division 5 in its discussion in the *Petroleum Carrier* case places significant reliance upon the word "articles." When the complaint was originally filed in the *Petroleum Carrier* case, the certificate involved included the phrase "commodities requiring the use of special equipment." The majority of Division 5, however, for reasons set forth in the report, revoked the certificate authorizing "commodities requiring special equipment" and issued a certificate reading "articles requiring special equipment." The entire discussion of the majority of Division 5 pertains to the

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[3] *E. Brooke Matlack, Inc.—Control—Reader Brothers, Inc.*, 80 M.C.C. 349 (1959).

[4] 51 M.C.C. 717 (1950).

description of "articles requiring special equipment." This is clear from the language at pages 720-21 of the *Petroleum Carrier* case as follows:

> We, therefore, concurrently with our action in this proceeding do hereby revoke certificate No. MC-106644 insofar as it authorizes the transportation of commodities requiring special equipment. A certificate authorizing transportation of articles requiring special equipment will be issued. *Our discussion hereafter will pertain to the latter commodity description.* [Emphasis added]

Appellant is simply asking the court to require the Commission to give effect to a particular commodity description which the Commission has included within one of its certificates of public convenience and necessity. It is difficult to understand why the phrase "contractor's machinery and equipment, heavy machinery," requires clarification. It is similarly difficult, if not impossible, to conceive of anything similar to contractor's machinery and equipment and heavy machinery which is not comprehended within the generally accepted definition of those words. In this posture, "commodities requiring the use of special equipment" must be given full meaning. In *Black* v. *Interstate Commerce Commission*,[5] the Circuit Court of Appeals for the Fifth Circuit in construing a similar certificate said:

> It becomes patent from an examination of the certificate in question that it was not intended to include within its scope the transportation of automobile parts. Specifically, *the certificate authorizes the transportation of five different classes or types of property*: (1) machinery and machinery parts; (2) road construction machinery; (3) contractor's equipment; (4) structural and reinforce-

[5] 167 F. 2d 825 (1948).

ing steel; and (5) commodities requiring the use of special equipment. [Emphasis added]

Therefore, it is appellant's contention that the phrase "commodities requiring the use of special equipment" has a definite meaning within itself, and since appellee admits in its motion to affirm that the phrase has no such meaning, rather it merely defines and clarifies the foregoing words, that the Commission has abused its discretion to the detriment of appellant. Judicial review is not abated by such agency discretion. We now respectfully request that the court make a more definitive statement, rather than add to the gigantic list of cases dismissing such suits on the sweeping ground of "agency discretion."

Respectfully submitted,

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